

<b>Miranda v ABEX Corp.</b>
2010 NY Slip Op 30315(U)
February 9, 2010
Supreme Court, New York County
Docket Number: 104346/08
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

Index Number : 104346/2008

MIRANDA, ERNESTO

VS.

ABEX

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. 104346/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided as per the memo decision of 2.9.10*

**FILED**  
FEB 17 2010  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 2.9.10

HON. SHERRY KLEIN HEITLER

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X  
ERNESTO MIRANDA and  
DIANA MIRANDA,

Plaintiffs,

Index No. 104346/08

**DECISION AND ORDER**

-against-

ABEX CORPORATION, et. al.,  
(GOODYEAR)

Defendants.

-----X  
**SHERRY KLEIN HEITLER, J.:**

In this personal injury action relating to an alleged asbestos exposure, defendant ABEX Corporation f/k/a The Goodyear Tire & Rubber Company ("Goodyear"), moves for summary judgment dismissing all claims and cross claims against it brought by plaintiffs, Ernesto Miranda ("Mr. Miranda") and Diana Miranda, on the grounds that Goodyear never manufactured nor distributed the asbestos-containing products that plaintiffs allege Mr. Miranda used.

Mr. Miranda, who is 58 years old, was diagnosed with malignant pleural mesothelioma on December 12, 2007. Thereafter, Mr. Miranda filed a cause of action against various defendants, requesting damages for exposure to asbestos-containing products. Shortly after the cause of action was filed, Mr. Miranda was deposed extensively over eight days.

During his lifetime, Mr. Miranda was a car-aficionado. He would often fix cars and change car brakes as favors to friends. Specifically, Mr. Miranda testified in his deposition that during the years ranging from 1970 through 1975, he fixed and worked on approximately 20 to 25 automobiles. (Miranda Deposition of June 17, 2008, 710:14-712:10, Exhibit E to Notice of Motion dated July 14, 2009 ["Notice of Motion"].) Mr. Miranda alleges he was exposed to asbestos containing Goodyear brakes through the use of such products while fixing cars. (*Id* at 710:17-712:10.)

During his deposition, when Mr. Miranda was questioned as to whether he recalled any of the brake brands used to repair automobiles in the 1970's, he stated "I recall some Goodyears definite." (Exhibit E to Notice of Motion, 712:5-10.) In response to this, Goodyear argues that it never manufactured and never sold automotive brakes or linings to local retail or auto-parts stores for resale. Thus, Goodyear moves for summary judgment on the ground that Goodyear automotive brakes or linings could not have been used by Mr. Miranda and his friends since they were never available in the local market for resale. (Affidavit of Richard Lyda, sworn to June 26, 2009, Exhibit L to Notice of Motion.)

Plaintiffs argue, however, that Goodyear did in fact sell asbestos-containing automotive brakes and linings to local retail stores during the time that Mr. Miranda was exposed. In support of this, plaintiffs present Mr. Miranda's testimony and Goodyear's "Answers to Plaintiff's Questionnaire and First Request for Production of Documents," ("Questionnaire") completed by Goodyear for a separate case in 1990. In the Questionnaire, Goodyear admitted to selling automotive brake products in the local or retail market. Goodyear responded to Interrogatory 2(n) that it was "[b]oth an installer for customers calling on Goodyear company retail auto service stores for brake service and a reseller to retail tire and automotive service stores buying and selling Goodyear tires and other Goodyear branded products." (Timmins Affirmation in Opposition to the Motion for Summary Judgment by Defendant Goodyear Tire & Rubber Company dated September 23, 2009, Exhibit 3, page 13, subsection n ["Affirmation in Opposition"].) In subsection b of the Questionnaire, Goodyear expressed that it was not the manufacturer of the brake products it was installing and selling to tire and automotive service stores retail. (*Id* at subsection b.)

In its "Reply Affirmation in Further Support of the Goodyear Tire & Rubber Company's Motion for Summary Judgment," ("Reply Affirmation") Goodyear introduced new evidence in the

form of an affidavit, in an apparent effort to clarify the information that the plaintiffs rely on as contained in the Questionnaire. (See Affidavit of Richard Lyda, sworn to October 22, 2009, Exhibit A to Reply Affirmation.) The Lyda Affidavit says that, “[n]either the question asked nor the response provided by Goodyear states that Goodyear sold brakes or brake linings to local or chain parts stores, or that Goodyear sold brake parts over the counter to the retail public. Goodyear never manufactured brake linings for automobiles....” (*Id.*) Insofar as this is in direct conflict with Mr. Miranda’s testimony and the Questionnaire, this only goes to strengthen the plaintiffs’ assertion of the existence of an issue of facts.

“The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination.” (*Dollas v. W.R. Grace and Co.*, 225 A.D.2d 319, 321 (1<sup>st</sup> Dept., 1996).) “[T]he issue is not whether plaintiffs can ultimately establish liability, but, rather, whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial.” (*Barr v. Albany County*, 50 N.Y.2d 247, 254 [1980].) Plaintiffs are not required to show a precise cause of their damages, but only to show facts and conditions from which defendant’s liability may be reasonably inferred. “That is, that ... plaintiff was exposed to defendant’s product.” (*Comeau v. W.R. Grace & Co. Conn.*, 216 A.D.2d 79, 80 (1<sup>st</sup> Dept., 1995).)

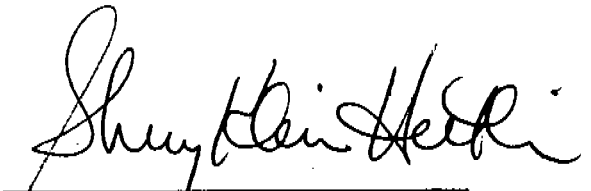
To obtain summary judgment, a defendant must, without relying on mere conclusions or unsubstantiated allegations, “make a prima facie showing that its product could not have contributed to the causation of the plaintiff’s injury.” (*Comeau v. W.R. Grace & Co. Conn.*, 216 A.D.2d 79, 80 (1<sup>st</sup> Dept., 1995)); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) “It must clearly appear that no material and triable issue of fact is presented.... This drastic remedy should not be granted where there is any doubt as to the existence of such issues..., or where the issue is ‘arguable’ ....” (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957].)

The deposition testimony of a plaintiff "constitutes evidence in admissible form by someone with personal knowledge of the facts." (*Joshephson v. Crane Club, Inc.*, 264 A.D.2d 359, 360 (1<sup>st</sup> Dept., 1999) and it "is sufficient to raise an issue of fact so as to preclude the grant of summary judgment dismissing the complaint." (*Dollas v. W.R. Grace and Co.*, 225 A.D.2d 319, 321 (1<sup>st</sup> Dept., 1996).)

In this case, the deposition testimony of Mr. Miranda, in which he specifically recalls using brakes branded with the name Goodyear, together with Goodyear's Questionnaire answers and the new affidavit introduced by Goodyear in its Reply Affirmation, are sufficient to raise issues of fact relative to the origin of Mr. Miranda's exposure to asbestos. Accordingly, defendant's motion for summary judgment is denied.

This shall constitute the decision and order of the court.

DATED: FEBRUARY 9, 2010

  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
FEB 17 2010  
NEW YORK COUNTY CLERK'S OFFICE